



BUSINESS LAW SECTION

NONPROFIT & UNINCORPORATED ORGANIZATIONS COMMITTEE

THE STATE BAR OF CALIFORNIA

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March 12, 2009

Assemblymember Van Tran
California State Assembly
State Capitol, Room 4130
Sacramento, CA 95814

Dear Assemblymember Van Tran:

I. Statement of Position

The Nonprofit & Unincorporated Organizations Committee (the “Committee”) of the Business Law Section of the State Bar of California (the “Section”) is pleased to sponsor Assembly Bill 285 (“AB 285” or the “Bill”) and welcomes this opportunity to make comments in support of AB 285. This is the first statement of position that the Committee has submitted in this matter.

A. Description of AB 285

The proposed revisions to Section 20 of the California Corporations Code (the “Code”) would permit California corporations to communicate electronically with their members and shareholders without complying with the constraints of the federal E-Sign Act, which are not appropriate for electronic communications by corporations under the California Corporations Code.

B. The Committee’s Position

The Committee fully supports AB 285 for the following reasons:

Code Section 20 defines “electronic transmission by the corporation.” It refers to electronic transmissions to a “recipient,” including directors, shareholders and members. It then provides that any such electronic transmission by a corporation to an individual shareholder or member is not authorized unless, in addition to satisfying the other requirements of the section, it satisfies the requirements applicable to consumer consent to electronic records as set forth in the federal Electronic Signatures in Global and National Commerce Act (“E-Sign Act”). This raises several issues. First, as explained below, the E-Sign Act was drafted for “consumers,” not for corporate communications to “members” or “shareholders,” so providing that the electronic transmission must be in accord with the requirements of the E-Sign Act raises more questions than it answers. Second, it requires that the corporation consult not only Section 20, but also the federal E-Sign Act, and attempt to interpret provisions which are not designed for this purpose. Third, Section 20 may be interpreted to require compliance with the E-Sign Act for transmissions from a corporation to its own directors (in their capacity as directors and in the course of a meeting), just because they are also “members” or “shareholders,” thus putting the legitimacy of board actions in question.

The provisions of Section 20 requiring satisfaction of the requirements of the E-Sign Act and the ambiguity as to when the E-Sign Act governs impact many of the uses of electronic transmissions by California corporations. For example, for for profit corporations, public benefit corporations, mutual benefit corporations, and religious corporations, this would include Code Sections 307, 5211, 7211, and 9211, respectively, which allow board members to participate in a meeting through the use of electronic transmission by and to the corporation; Sections 601, 5511, 7511, and 9411, which authorize notices of member meetings by electronic transmission by the corporation; and Sections 5513, 7513, and 9413 which allow ballots and any related material to be sent by electronic transmission by the corporation.

The problem, which greatly restricts the use of these sections (which otherwise would present opportunities for efficiencies and improved communication for California corporations), is the necessity of consulting the E-Sign Act, interpreting it and ensuring that the corporation seeking to electronically communicate with its members or shareholders complies with the requirements of the E-Sign Act. The E-Sign Act actually only applies to “consumers,” and that term is defined essentially as meaning persons who purchase or receive goods or services primarily for personal or household use. The problem is exacerbated by the fact that the Section 20 E-Sign Act requirement may be interpreted to apply to directors (or others), merely because they are also members or shareholders.

AB 285 would provide a workable standard in lieu of the E-Sign Act, while using it as a general guide. The constraints of the federal E-Sign Act are not quite appropriate for electronic transmissions by corporations under the Code. In fact, even if they were, it would be better if the actual requirements were in the Code rather than requiring people to go and find and then apply the federal law. The Bill also removes any ambiguity as to when the additional requirements

must be met. In addition, there apparently may be some concerns that the requirements of Section 20 run afoul of the SEC's "notice and access" regulation dealing with proxy materials.

II. Germaneness

The Committee believes that its members have the special knowledge, training, experience and technical expertise to provide helpful comments on the Bill and that the positions advocated herein are in the best interests of California nonprofit and for-profit corporations and their members and shareholders.

III. Caveat

This letter is that only of the Committee. The positions expressed herein have not been adopted by the Section or its overall membership or by the State Bar's Board of Governors or its overall membership, and are not to be construed as representing the position of the State Bar of California. There are currently more than 8,800 members of the Section. Membership in the Section is voluntary and funding for its activities, including all legislative activities, is obtained entirely from voluntary sources.

Very truly yours,

Nonprofit & Unincorporated Organizations Committee

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